No. 16054

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE WASHINGTON WATER POWER COMPANY, a corporation,
Appellee,

vs.

40 Acres of Land in the East Half, West Half, Southeast ¼ of Section 24, Township 45, North, Range 5, Idaho, JULIA NICODEMUS; R. H. SPENCER; THE UNITED STATES OF AMERICA; and Unknown Owners,
Appellants.

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Brief of Appellee

On Appeal from the United States District Court
District of Idaho, Northern Division

JOHN HUNEKE
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Of Spokane, Washington
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C. W. HILL PRINTING CO.

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STATEMENT OF JURISDICTION

1. (a) Appellee, as plaintiff below, alleged jurisdiction of the United States District Court, based on the Act of March 3, 1901, c. 832, #3; 31 Stat. 1084, Title 25 U.S.C. 357, as follows:

> "Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee." (This will be referred to throughout the brief as the Act of 1901.)

(b) The jurisdiction of the United States Court of Appeals, although not stated by appellant, must be based on the Act of June 25, 1948, c. 646, 62 Stat. 929; Title 28 U.S.C.A. 1291, which is in part as follows:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States."

and on Idaho Code condemnation section 7-704 as follows:

"Before property can be taken it must appear:

1. That the use to which it is to be applied is a use authorized by law.
2. That the taking is necessary to such use.
3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use."

The order questioned in this appeal is based on this last section of the code and is one interpreted by the Idaho courts as being *in limine* and appealable. (See *McLean v. District Court* 24 Ida. 441; 134 Pac. 536.)

2. Appellant's appeal challenges the validity or effect of the Act of 1901 referred to above, in light of a treaty ratified March 3, 1891 between the United States Government and the Coeur d'Alene Indians, Vol. 26 U. S. Statutes-at-Large, 51 Congress, p. 1028, quoted by appellant's counsel. (Br. 1, 2) (This treaty will be referred to throughout the brief as the Treaty of 1891.)

3. (a) Appellee, as plaintiff, alleged the jurisdiction of the Federal District Court in paragraph II of its complaint (Tr. 1).

(b) The United States District Court entered its Order of Use and Necessity and Appointing Commissioners (Tr. 28-31) to which the defendant Julia Nicodemus filed a motion for new trial, which motion was denied by the District Court in an order signed February 8, 1958 (Tr. 55-56). Defendant Julia Nicodemus served and filed a notice of appeal on March 6, 1958 to the United States Court of Appeals.

STATEMENT OF THE CASE

The Washington Water Power Company, appellee and plaintiff below, brought an action in the United States District Court for the District of Idaho, Northern Division, to condemn an easement for construction of a 230 KV electric transmission line across a portion of a certain 40 acres of land held by the United States in trust for Julia Nicodemus, an allottee Indian (Tr. 1-5). The United States, Julia Nicodemus and R. H. Spencer, a farmer tenant of the property, were all joined as defendants.

After a hearing at which all parties were represented, the District Court entered its Order *in limine*, as to use and necessity, and appointing commissioners (Tr. 28-31) in accordance with Idaho Code 7-704 (supra). To that order, defendant Julia Nicodemus interposed a motion for new trial which was disposed of by the order denying the motion (Tr. 55-56). Notice of appeal followed, raising as an issue the validity of the court's Order. Appellant contends the entry of such order was error, although the assignment of error refers to a motion to dismiss respondent's complaint.

Regardless of the assignment of error (Br. p. A) or the points on which appellant relies as filed herein, the sole legal question involved in this appeal is whether, in light of the Indian Treaty of 1891, and after tribal lands, with consent of the Indians, were allotted in severalty, the District Court was authorized to allow condemnation of an easement across such allotted lands under the act of 1901 and procedures set out in the Idaho condemnation statutes. Appellant argues that the District Court did not have that authority, and appellee contends that the court did have such power and that the order was properly entered.

SUMMARY OF ARGUMENT

Appellee submits:

I. that the condemnation for the easement is not contrary to the Indian Treaty of 1891; as it does not interfere with possession nor take any of the fee;

II. that the restrictions of the Treaty of 1891 no longer apply, because the Indian reservation has since been broken

up under the General Allotment Act; and

III. that the condemnation Act of 1901 allows condemnation for public purposes, only and specifically across allotted Indian lands, despite the earlier treaty concerning reservation lands; and that the procedure to be followed in such condemnation is set out in the statutes of the particular state in which lands are situated.

ARGUMENT

I.

The Indian Treaty of 1891 (supra) in using the words,

> "no part of said reservation shall ever be sold, occupied, open to white settlement or otherwise disposed of without the consent of the Indians residing on said reservation,"

did not specifically deny the right of condemnation for the purpose of acquiring an easement for construction of an electric transmission line. Appellee contends the treaty did not contemplate that the taking of such an easement would violate its terms. Under this view the treaty has not been violated by the condemnation, and such condemnation is proper.

II.

Even more persuasive, however, is the fact that the status of the lands has changed from tribal lands to lands held in severalty, and Julia Nicodemus in accepting an allottee Indian's patent to specific lands now has land to which the treaty no longer applies.

A chronological statement of events emphasizes this

fact. First, the Government under Executive Order of November 8, 1873 (Br. 2) set aside certain lands as tribal lands for a Coeur d'Alene Indian reservation. This was followed by the Treaty of 1891 (supra) agreed to on March 26, 1887 (Br. 1), providing for payments to the tribe and including the provision against disposition of the tribal lands relied on by appellant's counsel in their brief (Br. 1, 2). Subsequently, this Coeur d'Alene Indian reservation was broken up and, with consent of the Indians, the tribal land therein opened to settlement and allotted under the General Indian Allotment Act (Title 25 U.S.C.A. #331, Act of Feb. 8, 1887, c. 119, par. 1, 24 Stat. 388; Act. of Feb. 28, 1891, c 383, par. 1, 26 Stat. 794; amended June 25, 1910, c. 431, par. 17, 36 Stat. 859). Under this act, Julia Nicodemus received allotment No. 80, Coeur d'Alene Indian reservation, and patent was issued to her, subject to the usual statutory restrictions and provisions, and reserving title in the United States in trust.

Under these circumstances there is no longer any reservation or tribal land, and no land to which the treaty can apply. By taking allotments, the Indians, and Julia Nicodemus, have consented to a break up of the reservation and the time for relying on the treaty has long since expired. If there is any violation of the treaty, it is the taking under the Allotment Act, not condemnation under the Act of 1901. The status of the property has changed from a tribal Indian reservation to settled land devoted to farming by the allottee Indians individually, and not the tribe. An allottee Indian can not now complain about disposition of reservation land. The Act of 1901 applies by its terms only to lands

allotted to Indians and it can not apply to an Indian reservation. In *U. S. vs. Oklahoma*, 127 F. (2d) 349, the Court said:

> "Obviously, the power to condemn lands allotted in severalty to an individual Indian did not extend to Indian reservations, tribal lands, national forests, and other lands under the exclusive jurisdiction of the federal government. As to these lands, only the power to permit the use of a right-of-way under varying forms and conditions was authorized. * * * Land allotted in severalty is no longer part of the reservation nor is it tribal land; the virtual fee is in the allottee with certain restrictions on the right of alienation. *United States v. Minnesota*, 113 F. (2d) 770."

Because of the importance of setting the difference between reservation land and allotment land, the Supreme Court granted certiorari and this decision was affirmed in 318 U. S. 206; 87 L.Ed. 716, 63 Sp.Ct. 534. This answers many of the authorities in appellant's brief referring to encroachment on tribal lands (Br. 6-7).

III.

The principal question raised by appellant's counsel in their brief is whether an act of Congress, which counsel claim abrogates the terms of a prior treaty, should be followed by the court under the circumstances in this case. Appellant's counsel concede that Congress has the right to abrogate prior treaties with the Indians by later enactments (see citation from *Lone Wolf vs. Hitchcock*, 187 U.S. 553, Br. 3, 4) but state that such should not be followed here as this condemnation is not for the Indian's benefit. The only ground mentioned by appellant's counsel as to why it is

not for the Indians benefit, is that it violates the treaty right and as Congress has that right, appellant's counsel seem to be arguing in a circle.

Congress can, by legislative enactment, abrogate existing treaty rights. The United States retains sovereignty over Indian lands even after a treaty is signed, or the land allotted, and condemnation over such lands may be allowed by Congress even if it should abrogate a prior treaty. One of the latest pronouncements of this principle is in the case of the *Sioux Tribe of Indians vs. The United States,* 146 Fed. Supp. 229 (1956) in the Court of Claims wherein the court stated as follows:

> "While it had been the practice and policy of the United States Government during the many years of tension between the whites and the Indians to negotiate with them by treaty convention and to settle differences, if possible, by treaty, those treaties did not absolutely abrogate the right of the government to regulate the Indians or, when necessary, to legislate contrary to or inconsistently with a treaty."
> The Court also quoted with approval from *Lone Wolf v. Hitchcock* (*supra*) and also quoted the following from *Choate v. Trapp* cited by appellant's counsel (Br. 5).
> "The Supreme Court, in *Choate v. Trapp,* 1912, 224 U. S. 665, 671, 32 S. Ct. 565, 567, 56 L. Ed. 941, while speaking on this subject, stated as follows:
> "'* * * the plenary power of Congress over the Indian Tribes and tribal property cannot be limited by treaties so as to prevent repeal or amendment by a later statute. The Tribes have been regarded as dependent nations, and treaties with them have been looked upon not as contracts, but as public laws which could be abrogated at the will of the United States.'"

While appellant's counsel apparently concede this general principle of law, they then grasp at various straws and raise certain inferences attacking the procedure in this case. These inferences should be answered.

Inference (a). Appellant's counsel contend that this condemnation is not in the best interest of Julia Nicodemus because she is not a stockholder in the appellee company. The condemnation is not for the benefit of the stockholders. Obviously, it is for the benefit of the public, including Indians, and condemnation is allowed for that reason. The company is a public utility engaged in the transmission of electric current for the benefit of the citizens of Idaho, whites and Indians alike, regardless of their status as stockholders. The use of electricity by the general public and its transmission is in the general interest. The 1901 Act in allowing condemnation for public purposes carries out such right for the benefit of the public as a whole, not for any particular group or company. The general public, including whites and Indians and Julia Nicodemus are benefitted by the transmission of electricity. The District Court in the Order of Use and Necessity decreed as follows:

> "The plaintiff is a public utility corporation lawfully doing business in the State of Idaho as a public utility in the distribution of electric energy to the public and is duly authorized by law to exercise the right of eminant domain in the State of Idaho under and by virtue of Section 7-701 of the Idaho Code.
> "That the easement and rights sought to be acquired and appropriated by the plaintiff are necessary to the discharge of the public duties of the plaintiff and are necessary to the construction, use and maintenance and reconstruction of its power transmission line and that the taking of the land and property of the defendant sought to be acquired for such use." (Tr. 29)

Appellee submits that the authorities cited on page 5 of appellant's brief are not in point as they refer to different situations than condemnation, and do not sustain appellant's position. Certainly the general public good must be considered as justifying the application of the condemnation statute to this situation.

Inference (b). Appellant's counsel next suggest that the proper procedure was not followed in that plaintiff failed to obtain permission of the Secretary of the Interior before going ahead with the condemnation action. Appellee points out that the statute provides for two separate courses of action, either a permit from the Secretary of the Interior for erection of a transmission line, or by pursuing a condemnation action without seeking such permit. This difference has been clearly pointed out in *United States vs. State of Minnesota*, 113 F. (2d) 770 (1940):

> "The land involved is a tract of allotted Indian land held in trust by the United States * * *.
> "The question involved is whether the State may by virtue of Section 3 of the Act of March 3, 1901, 25 U.S.C.A. #357, maintain this proceeding to condemn an easement over the allotted land for the establishment of a public highway, without having first secured from the Secretary of the Interior permission for the opening and establishment of such public highway through allotted Indian land, as provided by Section 4 of the Act of March 3, 1901, 25 U.S.C.A. #311. * * *
> "The statutes seem definitely to offer two methods of procedure for the acquisition of a right of way for public highway. Section 3, 25 U.S.C.A. #357, authorizes the maintenance of condemnation proceedings.
> * * *
> "By Section 4 of the Act, 25 U.S.C.A. #311, the Secretary of the Interior is authorized to grant permission

> for the opening and establishment of a public highway through lands allotted in severalty. Thus, it was made possible to acquire such a right of way by either of two methods, the Government having consented to each of these methods."

Appellee submits that the proper procedure was followed in this instance.

Inference (c). Appellant's counsel inferentially complain that the Government should have vigorously contested the action and did not do so. Appellee concedes that the United States is a necessary party to the action and it was made a defendant. It is also clear that in a case involving the Act of 1901, the consent of the United States to suit is implied.

> "It is true that authorization to condemn confers by implication permission to sue the United States." *Minnesota vs. The United States,* 305 U. S. 382 at 388, 83 L. Ed. 235 at 241. 59 Sp. Ct. 292.

The Government appeared by the United States Attorney, he was present at the hearing, has taken an active part throughout the law suit, and procured an appraiser of the Indian Agency who furnished proof on the amount of damages in the hearing before the Commissioners. The Government attorney complied with all the necessities and has only followed a long established administrative practice in allowing such condemnation across Indian allottee lands. See *United States vs. Minnesota,* 113 F. (2d) 770.

> "The administrative officers of the Government, charged with the administration of this Act, have consistently construed it as authorizing the condemnation of allotted lands without the consent of the Secretary

> of the Interior. The Department of the Interior, in its booklet entitled 'Regulations of the Department of the Interior Concerning Rights of Way over Indian Lands,' published in 1929, pointed out the various laws applicable to the granting of rights of way through Indian lands, tribal and allotted, and gave direction for procedure. Sections 68, 69 and 70, under the heading of 'Condemnation of Allotted Lands,' provide:
> " '68. The condemnation of allotted Indian lands for any public purpose in accordance with the laws of the State wherein the lands are situated is authorized by the last paragraph of section 3 of the Act of March 3, 1901 (31 Stat. 1, 1058-1083-1084).
> " '69. Any project for which private lands could be condemned under State laws is held to be a public purpose within the meaning of the Act of March 3, 1901, above cited.' "

Inference (d). Appellant's counsel also argue by inference that the Act of 1901 allows a State to condemn Indian land. The Act only provides the rules and procedures under which such condemnation shall be allowed across allotted Indian lands. Congress has provided that as a Federal matter and in Federal Courts and with the United States as a party, condemnation of allotted lands may be had for any public purpose, and then provides that the action shall proceed in accordance with the Laws of the State where the property is located, and with the money paid to the allottee. The wording of the act above quoted in full seems to answer this argument under which appellant complains that certain rights have been surrendered to the States. Appellee contends that these rights are held under the control of Congress at all times and that the procedure, for purposes of convenience, are set in accordance with state statutes, provided that the action is carried on in the federal courts.

CONCLUSION

Appellee appreciates the fact that Julia Nicodemus does not want a portion of her land condemned for this purpose. This is true generally of defendants in condemnation actions. On occasion the public good requires stepping on individual toes. Such situations brought about the necessity of providing for condemnation actions for public purposes.

If Julia Nicodemus had fee title to the property without any interest being retained in trust by the United States, her land would clearly then be subject to condemnation. The Act of 1901 extends such right to United States lands held by Indians under allotment. In such circumstance, Julia Nicodemus should have no greater rights than anyone holding full fee title. The Act of 1901 recognizes this in using the words "in the same manner as land owned in fee may be condemned." Any prior treaty rights can not give any greater rights than she would have in the event she owned fee title. The Treaty of 1891 can not forever insulate that property against all public use, and especially does not do so when tribal land has been broken up in allotments and when Congress has provided that condemnation may then be had. It is appellee's position, which has been sustained by the Federal Courts, that Congress has provided for condemnation of allottee's land by the Act of 1901, and

that the prior treaty can not take away any of such authority. The District Court order should be affirmed.

Respectfully submitted,

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